

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6147

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

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ALFRED A. CURCI,

Appellant,

-against-

THE UNITED STATES OF AMERICA,
THE JUDGE ADVOCATE GENERAL OF
THE ARMY, and THE SECRETARY OF
THE ARMY,

Appellees.
----- x

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

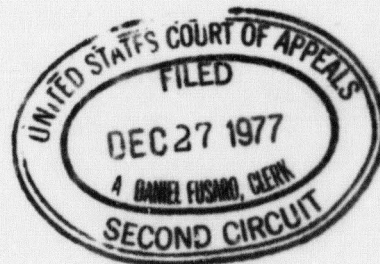
REPLY BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Curci v. United States No. 77-6147 REPLY BRIEF

Appellees urge affirmance on the basis of three fascinating
propositions: ^{1/}

- 1) Assignment of a non-lawyer to conduct Curci's general court-martial defense was not per se unconstitutional;
- 2) Article 69 determinations are inherently correct, and therefore unreviewable in the constitutional courts;
- 3) Contrary to the finding of the court below, duress never was placed in issue at Curci's court-martial, and accordingly the Army had no duty to fully and fairly consider the question of duress during post-trial proceedings.

Each of these propositions is patently flawed. Appellees' interjection of them demonstrates their unwillingness to grapple with the facts and legal issues which this appeal raises.

A. Appellees see significance in the refusal of sister circuits to hold unconstitutional per se the assignment of non-lawyer defense counsel. Brief at 14. The issue in the present case is whether the non-lawyer assigned was capable of providing effective assistance, given the complexity of the case.

1. In the alternative, appellees urge affirmance on the basis of an imagined bargain between opposing counsel. The fact of that remarkable transaction -- stipulating guilt in exchange for the prosecution's waiver of closing argument -- is a matter to be determined after a trial. By relying upon such flights of fancy, appellees effectively concede that at the very least, this case should be remanded for an evidentiary hearing, because there remains in dispute a material question of fact: why was the defense conducted as it was? F.R.Civ.P. 56(c)

Moreover, each of the cases upon which appellees rely points up the inadequacy of the proceedings in the court below. In two of the cases, the accused was defended at trial by a civilian lawyer and an assigned military attorney.^{2/} Thus, those cases have no direct pertinence. Nonetheless, in both of those cases, the conduct of counsel at trial was examined, and no substantial cause for complaint was found. In two other cases appellees cite, it was demonstrated in the district court that the assigned non-lawyer defense counsel had unusually strong training and experience, comparable to that of a law student appearing pro hac vice, or of a turn-of-the-century lawyer who was trained in a law office.^{3/} The record in the present case is bereft of any indication that defense counsel was an experienced lay practitioner. In a fifth case appellees cite, the trial errors alleged were trivial, and "ha[d] been dealt with 'fully and fairly' by the military."^{4/} In the present case, the trial errors were gross, and full and fair consideration was not had within the military justice system. In the final case appellees cite, no contention of prejudicially inept representation was made, and relief was denied in the pre-Argersinger view that a special court-martial was a misdemeanor proceeding, at which no right to assignment of a lawyer was acknowledged.^{5/} Significantly, this last case is the only one which addresses the Gideon precept that "lawyers in criminal courts

2. Harris v. Ciccone, 417 F.2d 479 (8th Cir. 1969), cert. denied, 397 U.S. 1078 (1970); Williams v. Froehlke, 356 F.Supp. 591, 594 (S.D.N.Y. 1973), aff'd, 490 F.2d 993 (2d Cir. 1974).

3. Angle v. Laird, 429 F.2d 892 (10th Cir. 1970); Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971).

4. Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968), cert. denied, 394 U.S. 934 (1969).

are necessities, not luxuries." 372 U.S. at 344.

Although appellant respectfully submits that Gideon and Argersinger render suspect the holdings upon which appellees rely, that question need not be reached in the present appeal. It is sufficient to examine counsel's conduct in the appropriate historical context. "From the earliest days of our military establishment, all officers of the military have been recognized as qualified to serve as counsel before courts-martial." United States v. Culp, 14 USCMA 199, 203, 33 CMR 411, 415 (1964). That historical fact arose in the context of a universal belief that courts-martial made no pretense of dispensing justice.

[M]artial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law.

I Blackstone, Commentaries 412 (Wendell ed. 1847). So long as courts-martial were merely something indulged, it was of no great consequence that defense counsel was utterly unqualified to protect an accused's interests in a criminal proceeding.

Appellees have the chutzpah to enlist Senator Ervin as a supporter of their claim that non-lawyer "military counsel are presumed to be as competent as their civilian counterparts." Brief at 14. To the contrary, Sen. Ervin wrote (in the article cited by appellees), "[T]he overwhelming majority of servicemen tried by special court-martial are represented by non-lawyer officers who know next to nothing

5. Kennedy v. Commandant, 377 F.2d 399 (10th Cir. 1967).

about military law." Ervin, The Military Justice Act of 1968, 45 Mil. L. Rev. 77, 84 (1969). It was that distinguished senator's view that

most special courts-martial are complex and serious enough proceedings to warrant a requirement that the accused be represented by a lawyer who understands the role of statutes and precedents, is familiar with legal defenses and rules of evidence, and knows at least the basic concepts of constitutional law. It is sheer fantasy, in my view, to contend that a veterinary officer or a transportation officer who reads a few pages of the Uniform Code and the Manual for Courts-Martial can adequately represent a defendant in such a proceeding.

Id., 45 Mil. L. Rev. at 85. If such be the case with special courts-martial, à fortiori such must be the case with Curci's general court-martial. As Judge Ferguson long since stated:

An officer of the armed services of necessity cannot receive the training required to perform adequately as counsel for an accused. At the most, he receives a general orientation course in military law during his attendance at various service schools or takes a few sub-courses in various aspects of administration. At no time is he subjected to the rigorous and intensive process which fits one to become the advocate of an individual enmeshed in the toils of the criminal law....

Aside from the inability of an officer counsel to perform his duties because of lack of proper grounding in law, there is also the important question of the ethical responsibilities imposed by our profession upon its members. Laymen will never understand an attorney's devotion to the interests of an "obviously guilty" client or the single-minded loyalty to the latter's cause which almost unexceptionally characterizes the practice of law. Too often, it must seem to the officer untrained in the law that his duty lies in the direction of the armed force to which he belongs rather than to the accused whom he represents It seems to me well nigh impossible for one untrained both in the law and the inviolable standards of the legal profession to put to one side what he might conceive as his responsibility to the service and devote himself entirely to the interests of an individual whom he may privately think undesirable.

United States v. Culp, supra, 14 USCMA at 219, 220, 33 CMR at 431, 432.

B. Appellees miscite their own authorities when they take exception to appellant's contention that the standard governing the present Article 69 appeal is "identical to the standard that prevails in every direct criminal appeal, civilian or military." Brief at 10. Appellees cite H. Moyer, Justice and the Military at 619 and 620, but conveniently disregard that treatise at 619-20:

Of the four bases of relief provided by "new" article 69, by far the most important is "error prejudicial to the substantial rights of the accused," the primary ground for relief on ordinary appellate review. See art. 59(a), UCMJ [10 U.S.C. §859(a)].

See also F.R.Cr.P. 52(a) ("Any error . . . which does not affect substantial rights shall be disregarded.").

Upon the erroneous premise that Article 69 creates a discretionary remedy rather than a remedy at law, appellees next argue in substance that so long as the form of proceeding contemplated by that statute is evidenced, no inquiry can be made into the substance of the Article 69 proceeding. Thus, appellees point out that there is no statutory or constitutional requirement that a written opinion be delivered in which each alleged error is addressed.^{6/} Brief at 12. Appellees thereupon invoke a non-sequitur: "because the record reveals no support for Curci's claim that his Article 69 petition was decided in a manner inconsistent with military precedent ..." Id. In form, the appeal concededly conformed to precedent -- but in substance, as appellees well know, the disposition was arbitrary, capri-

6. Appellees quote the district court's reference to the "enormous caseload" that justifies short form opinions. During fiscal year 1975, when this Article 69 appeal was considered, the Judge Advocate General of the Army received exactly 365 records of trial for Article 69 review. Annual Report of the Judge Advocate General of the Army, 1975 at 15.

cious, and unreconcilable to the precedents governing effective assistance of counsel, fair post-trial review, and duress. The intervening McPhail decision of the Court of Military Appeals leaves no room for appellees' contention, implicit in their argument, that an Article 69 disposition is unreviewable.

C. Appellees for the first time contend that the duress defense was not put in issue, and indeed was not available to appellant, at his court-martial. If such be the case, then the Army had no duty to fully and fairly consider the duress question. But the military authorities clearly establish that duress was properly placed in issue at the court-martial.

To place duress in issue, a military accused need make only the slightest showing of fear. His fear need not be a response to any expressed threat; it is enough that the accused imagined a danger.^{7/} His fear need not be of harm to himself; it is enough that harm to a third party is threatened.^{8/} Most significantly, the feared harm need not be imminent and impending; there need be no gun at the actor's head or scalpel at his testicles.^{9/}

Thus, in the present case, it was enough that the accused testified (56a):

if I did not get the operation, that I would be court-martialed. Upon hearing this and being very frightened about getting this operation and having them cut open my testicle and operate on me, I went AWOL, sir.

7. United States v. Brookman, 7 USCMA 729, 731, 23 CMR 193, 195 (1957) (fear of reprisal from fellow participants in escape and car theft).

8. United States v. Pinkston, 18 USCMA 261, 39 CMR 261 (1969) (guilty plea improvident notwithstanding specific waiver of duress defense premised upon fear of "harm to his fiancée and his child").

9. United States v. Jemmings, 24 USCMA 251, 51 CMR 630 (1976) (harm threatened at uncertain future time); United States v. Mergelony,

Duress having been placed in issue -- as the court below recognized -- it was incumbent upon the Army to give the matter full and fair consideration in the post-trial review and in the Article 69 proceeding. The Army's failure to do so denied appellant due process of law.

D. Appellees refusal to grapple with the issues, their insistence on distorting the record and the authorities, and their preference for fantasy rather than fact, evidences the impropriety of the Army's conduct and the error committed by the court below. For the reasons set forth herein and those set forth in the Brief for Appellant, it is respectfully urged that the judgment of the district court be reversed.

Respectfully submitted,

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(continued)

14 USCMA 55, 33 CMR 267 (1963)(same); see also State v. Toscano, 74 N.J. 421, 432-43, ___ A.2d ___ (June 27, 1977)(same; surveying common law authorities).

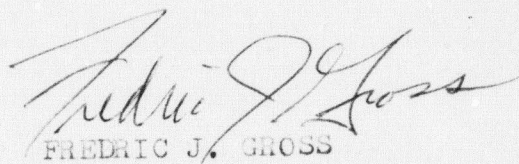
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CURCI v. UNITED STATES

No. 77-6147

Certificate of Service

I hereby certify that I have caused two copies of the Reply Brief for Appellant in the above-captioned matter to be served upon the United States Attorney for the Eastern District of New York this ^{22nd} ~~21st~~ Day of December, 1977, by mailing same in a postage prepaid envelope addressed to counsel for appellee at his office of record.



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